78-1826

Supreme Court, U. S.
FILED
SEP 5 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1876

JOHN RESETAR, JR.,

Petitioner,

v.

THE STATE BOARD OF EDUCATION OF MARYLAND, ET AL.,

Respondents.

BRIEF IN OPPOSITION OF RESPONDENT THE STATE BOARD OF EDUCATION OF MARYLAND

STEPHEN H. SACHS,
Attorney General
of Maryland,
DAVID H. FELDMAN,
Assistant Attorney General,
Chief of Litigation,
THOMAS E. PLANK,
Assistant Attorney General,
1400 One South Calvert Street,
Baltimore, Maryland 21202,
(301) 383-3737
Attorneys for Respondent
The State Board of Education
of Maryland.

September 5, 1979

The Daily Record Co., Baltimore, Md. 21202

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	4
I. The Questions Presented by the Petitioner Were Neither Presented to Nor Decided by the Court of Appeals	5
II. The Questions Presented Are Not Substantial Federal Questions That This Court Should Review	9
CONCLUSION	13

TABLE OF CITATIONS

Cases

Bishop v. Wood, 426 U.S. 341 (1976)	10
Board of Education of Charles County v. Crawford, 284 Md. 245, 393 A.2d 835 (1979)	11
Cardinale v. Louisiana, 394 U.S 437 (1969)	5
Carey v. Piphus, 435 U.S. 247 (1978)	11
Givhan v. Western Line Consolidated School District, ___ U.S. ___, 58 L. Ed. 2d 619 (1979)	12
Lavine v. Milne, 424 U.S. 577 (1976)	10
Mathews v. Eldridge, 424 U.S. 319 (1976)	10
Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977)	12
Opp Cotton Mills, Inc. v. Administrator, 312 U.S. 126 (1941)	11
Resetar v. State Board of Education of Maryland, 284 Md. 537, 399 A.2d 225 (1979)	1, 6

PAGE

Constitutional and Statutory Provisions

Constitution of the United States:
First Amendment ..... *passim*
Fifth Amendment ..... *passim*
Fourteenth Amendment ..... *passim*

United States Code:
Title 28, § 1257(3) (1976) 5
Annotated Code of Maryland:
Article 77, § 114 (1975) 4, 11

Rules

Supreme Court Rule 23(f) 5
Maryland Rule 885 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1876

JOHN RESETAR, JR.,

Petitioner,

v.

THE STATE BOARD OF EDUCATION OF MARYLAND, ET AL.,

Respondents.

BRIEF IN OPPOSITION OF RESPONDENT THE STATE BOARD OF EDUCATION OF MARYLAND

Respondent, The State Board of Education of Maryland (the "State Board"), respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion and judgment of the Court of Appeals of Maryland in this case. The court's opinion is reported as *Resetar v. State Board of Education of Maryland,* 284 Md. 537, 399 A.2d 225 (1979).

STATEMENT OF THE CASE

The petitioner seeks review of the decision of the Court of Appeals of Maryland upholding the petitioner's dismissal from employment as a teacher by the Board of Education of Montgomery County (the "County Board") and the State Board. The dismissal stemmed from three incidents of intemperate conduct

by the petitioner. The first incident occurred on November 15, 1972, when the petitioner called a guidance counselor a "God damned liar" (pet. app. 35a). The second incident in February 1973 involved remarks by the petitioner to a black student about her cleanliness (pet. app. 35a-36a). In the third incident on June 18, 1974, the petitioner responded to some remarks made to him by certain black students with the comment: "Look at those jungle bunnies. Somebody ought to feed them bananas." After a number of students complained about this remark, the Superintendent of Schools of Montgomery County notified the petitioner by a letter dated September 16, 1974, that he would recommend to the County Board that the petitioner be dismissed for misconduct in office, effective October 11, 1974.

The petitioner requested a hearing, and the County Board referred the matter to a hearing examiner, who held hearings on December 18 and 30, 1974. After evaluating the testimony of seventeen witnesses, as well as sixteen exhibits, the hearing examiner found that each incident was misconduct, that the "jungle bunnies" comment was the most serious incident, that none of these episodes standing alone warranted dismissal, but that the three incidents showed a persistent pattern of intemperate outbursts, of which the petitioner had been officially warned. Accordingly, in a report issued February 25, 1975, the hearing examiner recommended that the petitioner be dismissed for misconduct in office.

The petitioner requested a hearing before the County Board, which was held on April 10. On April 14, the County Board adopted the findings and recommendations of its hearing examiner and ordered the petitioner's dismissal. However, because it was unable to render its decision within thirty days of the receipt of the hearing examiner's recommendation, it ordered that the petitioner be restored to pay for the period of March 27 to April 10, 1975.

The petitioner appealed to the State Board. The State Board referred the matter to its own hearing examiner, who conducted a *de novo* evidentiary hearing on July 28, 1975. Eleven witnesses testified at this hearing. The examiner, after considering all of the evidence at the hearing, including the transcript of the hearing before the County Board's hearing examiner, made the same findings, conclusions, and recommendations as the County Board's hearing examiner. He also considered and rejected the petitioner's contention that the failure of the County Board to issue an opinion within thirty days of receiving the recommendation of its hearing examiner deprived the County Board of the authority to order his removal. Thus, the State Board's hearing examiner recommended that the State Board determine that the petitioner was properly dismissed. On November 24, 1975, the State Board adopted the findings, conclusions, and recommendation of its hearing examiner.

The petitioner filed an appeal to the Circuit Court for Montgomery County on December 23, 1975. Two years later, on December 30, 1977, the petitioner filed a motion for leave to present additional evidence. The circuit court denied this motion on January 31, 1978, and affirmed the petitioner's dismissal on February 23. The petitioner appealed to the Court of Special Appeals of Maryland and, before oral argument in that court, the Court of Appeals of Maryland issued a writ of certiorari on its own initiative and heard oral argument on the briefs that had been filed in the court of special appeals.

The court of appeals issued its decision on March 8, 1979. In this decision, the court considered all of the issues presented to it by the petitioner and held (1) that the County Board did not lose the power to dismiss the petitioner because it issued its decision ordering dismissal more than thirty days after receiving the recommendations of its hearing examiner, instead of

within thirty days as provided by its rules; (2) that the circuit court properly refused to allow the petitioner to present additional evidence when the petitioner did not show that the additional evidence was material and that the petitioner had good reasons for failing to present the additional evidence to the County and State Boards; (3) that the petitioner's conduct amounted to misconduct within the meaning of section 114 of article 77 of the Annotated Code of Maryland (1975) [now codified as Md. Educ. Code Ann. § 6-202 (1978)]; and (4) that there was substantial evidence to support the conclusions of the County and State Boards that the petitioner should be dismissed.

REASONS FOR DENYING THE WRIT

The petitioner presents to this Court three questions. First, he alleges that the findings of the State Board and the decision to dismiss him were arbitrary and capricious and that the reasons for the dismissal were not sufficient cause within the meaning of section 114 of article 77 of the Maryland Code. Therefore, he says, his dismissal violates his due process rights under the fifth and fourteenth amendments of the United States Constitution. Second, he argues that the failure of the County Board to issue its decision within thirty days of receiving the recommendations of its hearing examiner violated his rights to due process, even though the County Board reinstated the petitioner for fifteen days as compensation for the delay. Finally, the petitioner argues that he was dismissed because of the exercise of his right of free speech guaranteed by the first amendment to the United States Constitution.

This Court should deny the petition for writ of certiorari. None of the questions presented in the petition were properly presented to the court of appeals for decision, and thus the court of appeals did not issue a decision on any of these questions. Moreover, even if the issues had been properly raised and decided below, they are not substantial federal questions that this Court should address.

I.

THE QUESTIONS PRESENTED BY THE PETITIONER WERE NEITHER PRESENTED TO NOR DECIDED BY THE COURT OF APPEALS.

The Court's jurisdiction to entertain this petition for writ of certiorari rests upon 28 U.S.C. § 1257(3) (1976), which states:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . .
>
> (3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . [of] the United States.

It is well settled that this Court will not grant a writ of certiorari if the questions presented by the petition have not been presented to or decided by the appropriate state court. *Cardinale v. Louisiana*, 394 U.S. 437, 438-39 (1969). Indeed, Supreme Court Rule 23(f) requires the petitioner in his statement of the case to specify the stage in the state court proceedings at which the federal questions sought to be reviewed were raised, the method by which they were raised, and the way in which they were passed upon by the court. In addition, the rule requires the petitioner to support these statements either with pertinent quotations of specific portions of the record or with appropriate summaries of the record and specific references to the record. This must be done in order to show that the federal questions were timely and properly raised in the state court and therefore that the Court has jurisdiction to review the judgment of the state court on writ of certiorari.

In this case, the petitioner has not complied with this rule. His failure is inevitable because the federal questions were not presented to or decided by the Court of Appeals of Maryland. The court of appeals sets forth

in its decision the contentions that the petitioner made in that court:

> In this Court Resetar contends: (1) the circuit court erred in refusing to permit him to present additional evidence; (2) it likewise erred in "finding and determining that there was sufficient evidence to warrant [his] dismissal . . . as a tenured teacher in the Montgomery County school system"; (3) "[t]he alleged statement attributed to [Resetar] involving a statement of racial connotation did not constitute an act of misconduct" warranting his dismissal; and (4) the County Board "was precluded from dismissing [him] for misconduct in office after reinstating him as a tenured teacher in the school system for the period of March 27 to April 10, 1975."

284 Md. at 546, 399 A.2d at 230 (pet. app. at 10a). These issues involve matters of state law only. They do not contain even a hint of any federal due process or first amendment violations. Significantly, there is nothing either in the opinion of the court of appeals or in the dissent by Judge Orth and Chief Judge Murphy that discusses or even mentions any of the contentions that the petitioner now raises.

The court's characterization of the issues is an accurate reflection of the questions presented by the petitioner's brief to it. Petitioner's brief at 10. Indeed, the only places in which the words "due process" appear in the petitioner's brief are in the petitioner's first argument that the circuit court erred in not allowing the petitioner to present additional evidence in the circuit court proceedings. The petitioner's brief states at 17:

> To support [petitioner's] position in this respect and even bearing on the legal question of "due process" in this case before the administrative agencies [petitioner] sought to prove to the trial Court below through some of the witnesses he subpoenaed, and by new evidence and additional

> evidence all material to these issues, that the so-called "jungle bunnies incident" was not as serious and/or aggravated as the [respondents] found and made the same out to be in this cause; and [petitioner] submits that if the trial Court below had given him the opportunity to submit the new and additional material evidence the same would have, indeed, diluted the nature of said charge of misconduct and the degree of its manifest meaning.

The petitioner's brief also states at 21:

> [Petitioner] submits that the Court had a duty and obligation to receive additional material evidence . . . since he, as a tenured teacher, had and has a property right in his teaching position in the Montgomery County school system. Accordingly, he cannot be denied his property right, nor can he be dismissed from his position as a tenured teacher without due process in accordance with law. In the case at bar here the dismissal of [petitioner] teacher was not in accordance with due process of law as required and provided by the Constitution of the United States of America and the Constitution of the State of Maryland. A valuable property right cannot be denied a person without due process.

None of these vague and general references in his brief constitute the proper presentation to the court of appeals of the issues that the petitioner now attempts to bring to this Court. Nowhere in the petitioner's brief did he present an argument that, notwithstanding four separate administrative proceedings and the review of those proceedings by the Circuit Court for Montgomery County, he was deprived of due process because he believes that the decisions of the State and County Boards were arbitrary and capricious and unsupported by substantial evidence. Nowhere in the brief did the petitioner argue that the delay in the issuance of the County Board's decision to dismiss him, for which he received fifteen days of retroactive back pay, deprived him of due process. Finally, nowhere in his brief appear

the words "first amendment" or "right of free speech" or any argument that he was dismissed because of the exercise of his first amendment rights.

As to the allegations of infringement of his right of free speech, the petitioner makes this argument for the first time in his petition to this Court. His petition for appeal to the Circuit Court for Montgomery County contained only the vaguest allegations of the violation of petitioner's constitutional rights to due process:

> 8. Plaintiff respectfully submits that his substantial rights have been affected, prejudiced and denied to him and says that in the proceedings set forth in paragraphs 1 through 7 of this, his Petition of Appeal, that the administrative findings, inferences, conclusions and decisions culminating in his dismissal as a tenured teacher were in violation of his basic constitutional rights under the Constitution of the State of Maryland and the Constitution of the United States of America. That plaintiff has been prejudiced and removed from office as a tenured teacher in violation of his rights to due process in this matter.
>
> . . . .
>
> 10. Plaintiff respectfully submits that his substantial rights were affected, and that he was denied due process by unlawful procedure made and indulged in by the defendant, the Board of Education of Montgomery County, Maryland, which was subsequently compounded by The State Board of Education of Maryland's ratification of the unlawful procedures made and indulged in by the Board of Education of Montgomery County, Maryland.

Petition of appeal, paragraphs 8 & 10 (Cir. Ct. Montgomery Co., filed Dec. 23, 1975). The other paragraphs of the petition for appeal allege that the dismissal of the petitioner was in excess of the County and State Boards' statutory authority and jurisdiction, was contrary to law, and was unsupported by substantial evidence.

Nowhere did the petitioner make any allegation that he was being deprived of his constitutional right of free speech. Therefore, even though the petitioner may have been able to raise the due process questions in the court of appeals if he had desired to do so, he could not have raised the free speech issue in the court of appeals. *See* Maryland Rule 885 (providing that the court of appeals "will not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the circuit court" but that, when a question of law had been presented to the circuit court and the decision on that question by the court of appeals is necessary or desirable, the court of appeals may decide the question even though it was not decided below).

In conclusion, the court of appeals did not decide any of the questions presented to this Court, for the simple reason that the petitioner never properly presented those questions to the court of appeals. Thus, the petitioner for a writ of certiorari should be denied.

II.

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL FEDERAL QUESTIONS THAT THIS COURT SHOULD REVIEW.

Petitioner's Due Process Claims

The petitioner makes two arguments that the County and State Boards deprived him of due process when they ordered his dismissal. First, he alleges that the decisions of the County and State Boards were arbitrary and capricious because they were not supported by substantial evidence and because the intemperate outburts for which he was discharged do not in law amount to misconduct. Second, he argues that the failure of the County Board to issue its decision within thirty days of receiving the hearing examiner's recommendations deprived him of due process.

Both of these arguments are frivolous. The petitioner had two full evidentiary hearings to determine whether

he should be dismissed from employment with the Montgomery County school system—a hearing before the County Board's hearing examiner which involved the testimony of seventeen witnesses and sixteen exhibits, and a *de novo* hearing before the State Board's hearing examiner, who heard the testimony of eleven witnesses in addition to reviewing the full transcript of the proceedings before the County Board's hearing examiner. The petitioner had an opportunity to present argument to the County Board, which he took advantage of, and he had a complete review of the administrative proceedings by the circuit court and by the court of appeals. Four separate administrative officials and agencies and two judicial tribunals have found that the incidents of intemperate conduct by the petitioner warranted his dismissal or that there was substantial evidence to support his dismissal. The petitioner has had an overabundance of "the opportunity to be heard at a meaningful time and in a meaningful manner", *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), and thus has not been deprived of due process.

Furthermore, the argument that the alleged arbitrariness of the State and County Boards' decisions violated the petitioner's rights of due process does not present any new or significant federal question. Indeed, this Court held in *Bishop v. Wood*, 426 U.S. 341, 349-50 (1976), that a federal court is not the appropriate forum in which to review the many personnel decisions made by public agencies and that the due process clause of the fourteenth amendment is not a guarantee against incorrect or ill-advised personnel decisions taken by public agencies. *See also Lavine v. Milne*, 424 U.S. 577, 587 (1976) ("The [due process clause of the] Fourteenth Amendment does not guarantee that all decisions by state officials will be correct . . . .").

Moreover, it certainly cannot be argued that there is no rational basis for the County and State Boards' findings that an individual who has engaged in a substantial pattern of intemperate conduct is not fit to

be a teacher in a public school. Thus, the determination of the County and State Boards that the pattern of intemperate conduct of the petitioner was misconduct within the meaning of article 77, section 114 of the Maryland Code does not present any significant question of the interpretation of the due process clause.

The claim that the petitioner was denied due process because of the County Board's delay in issuing its opinion is also clearly frivolous. The petitioner cannot claim a due process right to having a decision by the County Board within thirty days of its receiving the findings and recommendations of its hearing examiner. The process due the petitioner was that specified by state law, i.e., the regulation of the County Board. The court of appeals construed the regulation's thirty day requirement to be directory, not mandatory. Thus, the petitioner was not denied any process that he was due when the County Board did not issue its decision within thirty days.

More importantly, the delay had no bearing on the finding that the petitioner was guilty of misconduct. *See Carey v. Piphus*, 435 U.S. 247, 260 (1978); *Board of Education of Charles County v. Crawford*, 284 Md. 245, 395 A.2d 835 (1979). Moreover, any defect in the procedure was cured by the full *de novo* evidentiary hearing before the State Board's hearing examiner. *Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126 (1941); *Board of Education of Charles County v. Crawford*, 284 Md. at 253-59, 395 A.2d at 838-42. Finally, the petitioner suffered no deprivation of a property interest and no prejudice because of the County Board's delay. The County Board reinstated the petitioner for a fifteen-day period to account for the delay in its decision, and thus any deprivation caused by the delay was cured.

Petitioner's First Amendment Claim

The record in this case clearly establishes that the petitioner was not dismissed because of his reference to certain black students as "jungle bunnies". He was

dismissed because he exhibited a pattern of intemperate conduct, as demonstrated by three separate outbursts. Thus, although the use of the expression "jungle bunnies" was the most serious of these intemperate outbursts, the County Board's hearing examiner specifically found that this one outburst alone would not be enough to warrant dismissal. Hence, even if the petitioner had preserved the first amendment issue for review by this Court, his case does not present a clear issue of whether the dismissal of a public school teacher for uttering racial epithets infringes his or her first amendment right of free speech. *See Givhan v. Western Line Consolidated School District,* ___ U.S. ___, 58 L. Ed. 2d 619 (1979); *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274 (1977).

If the petitioner had made this argument to the County or State Boards, they could have made specific findings of whether the other two incidents were sufficient to warrant his dismissal. If the County or State Boards had determined that the two incidents were not sufficient to warrant dismissal, and that the petitioner in effect was dismissed because of the "jungle bunnies" incident, then the case may have presented the conflict between the petitioner's choice of words and the legitimate interests of the County and State Boards that its public school teachers refrain from making racially derogatory and inflammatory remarks. Similarly, if the petitioner had made this argument to the circuit court and to the court of appeals, those courts would have considered and decided the issue. Because the petitioner did not present this argument either to the agencies involved or to the Maryland courts, this Court does not have the benefit of a proper record upon which to decide the issue and does not have the benefit of the views of the State courts. Consequently, the first amendment issue now presented by the petitioner is not a substantial federal question that this Court need or should address.

CONCLUSION

For these reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

STEPHEN H. SACHS,
Attorney General
of Maryland,
DAVID H. FELDMAN,
Assistant Attorney General,
Chief of Litigation,
THOMAS E. PLANK,
Assistant Attorney General,
1400 One South Calvert Street,
Baltimore, Maryland 21202,
(301) 383-3737
Attorneys for Respondent
The State Board of Education
of Maryland.

September 5, 1979